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In the

Supreme Court of the United States

OCTOBER TERM, 1980

CITY OF MILWAUKEE, THE SEWERAGE COMMISSION OF THE CITY OF MILWAUKEE, AND THE METROPOLITAN SEWERAGE COMMISSION OF THE COUNTY OF MILWAUKEE,

Petitioners,

vs.

PEOPLE OF THE STATE OF ILLINOIS AND PEOPLE OF THE STATE OF MICHIGAN,

Respondents.

BRIEF OF THE ILLINOIS STATE CHAMBER OF COMMERCE AS AMICUS CURIAE IN SUPPORT OF THE PETITIONERS, CITY OF MILWAUKEE, ET AL.

RICHARD J. KISSEL
JEFFREY C. FORT
JOANNA C. NEW
MARTIN, CRAIG, CHESTER & SONNENSCHEIN
115 South LaSalle Street
Suite 2400
Chicago, Illinois 60603
(312) 368-9700

The Scheffer Press, Inc.—(312) 263-6850

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BRIEF OF THE ILLINOIS STATE CHAMBER OF COMMERCE AS AMICUS CURIAE IN SUPPORT OF THE PETITIONERS, CITY OF MILWAUKEE, ET AL.

INTEREST OF AMICUS CURIAE

The Illinois State Chamber of Commerce ("State Chamber") is a not for profit corporation with a membership of approximately 20,000 members and 6200 firms. These companies represent a cross-section of the Illinois economy, including manufacturing, agriculture, finance, transportation, the professions, and the service industries.

The goals of the Illinois State Chamber are to maintain a sound economy and a healthy environment. On behalf of its members the Illinois State Chamber has strongly supported an environmental protection program for Illinois to achieve these goals. Our organization has been directly involved in the Illinois environmental protection program for ten years. The Illinois State Chamber also participated as a proponent in the debates surrounding the "economic impact" amendment to the Illinois Environmental Protection Act. That provision mandates that, before any new environmental measure is adopted for the State of Illinois, the Illinois Pollution Control Board must consider whether the potential economic harm to the people of Illinois that could result from a proposed statute or regulation would outweigh its environmental benefits. Ill. Rev. Stat., ch. 111 ½ §1027 (b); *see Illinois State Chamber of Commerce* v. *Pollution Control Board,* 67 Ill.App.3d 839, 384 N.E.2d 922 (1st Dist. 1978) *aff'd,* 78 Ill. 2d 1 (1979).

The Illinois State Chamber has cooperated with the Illinois Pollution Control Board, the Illinois Institute of Natural Resources, and the Illinois Environmental Protection Agency in order to assure that technologically feasible and economically reasonable pollution control standards were promulgated. We have worked with these state agencies to achieve environmental objectives with necessary business safeguards. The Illinois State Chamber has contributed to the necessary legislation and regulations for delegation of federal environmental control authority to Illinois, including the National Pollutant Discharge Elimination System, the New Source Performance Standards, and the State Implementation Plan under the Clean Air Act. The State Chamber also served

on a task force dealing with hazardous waste disposal and toxic substances spills. With the Illinois Environmental Protection Agency and the United States Environmental Protection Agency, the State Chamber has sponsored statewide conferences on environmental control programs. The Illinois State Chamber is represented on the Illinois Policy Advisory Committee of the Illinois Environmental Protection Agency. We have continually demonstrated through our involvement in the issues of environmental regulation, our willingness to work toward solutions to environmental problems in a spirit of good faith and cooperation.

As a representative of the economic community of Illinois, the Illinois State Chamber's interests in this case reflect the diversity of its membership. Of general concern is the increased local tax burden that Illinois businesses would be asked to carry if a federal common law standard was added to the standards already applicable to municipal water dischargers under the Clean Water Act. Imposition of a common law standard would affect every establishment located in a municipality with a waste water treatment facility. Even if a business never used the publicly-owned treatment works to discharge industrial waste, it would be required to finance the additional costs of meeting a common law standard through a general tax assessment. Those establishments that use a publicly-owned treatment works as their waste-water disposal facility will be required to pay a proportionate share of the increased construction and operating costs of the treatment works to meet an effluent standard which coud be more stringent than that imposed by Congress. Direct dischargers to navigable waters, now subject to the requirements of categorical technology-based treat-

ment standards and the National Pollutant Discharge Elimination System permit program of the Clean Water Act, would face the uncertainty of meeting an additional or inconsistent standard determined by the federal district court, which could result in an unnecessary financial burden.

The Illinois State Chamber has sought to support the statutory and regulatory programs of environmental control in all its aspects: air, water and land. If this Court permits a common law of nuisance to be applied to environmental control standards in derogation of Congress' statutory scheme, we believe our efforts to balance the economy and the environment will be nullified.

CONSENT

We present this brief with the consent of all the parties, pursuant to Supreme Court Rule 42, on behalf of the Petitioners, City of Milwaukee, et. al. Copies of letters of consent have been filed with the Clerk of the Court.

QUESTION PRESENTED

Where the Congress has enacted a comprehensive scheme to protect the environment, should the federal courts have the authority to override that scheme by applying a federal common law of nuisance in the area of environmental control?

SUMMARY OF ARGUMENT

The environment has taken its place in the mainstream of political debates along with the economy, national security, taxes and welfare. Congress confronts environmental issues, and continues to review them in the light of national policy considerations. In the past ten years,

Congress has enacted more than ten major federal statutes to protect the environment. The major "federal pollution control" statutes specifically provide for resolution of interstate disputes and provide a federal forum for the complaining state. Because Congress has addressed the issues concerning the environment generally, and specifically the issues raised here by the Illinois Attorney General, and will continue as the forum for that debate, the imposition of a doctrine of federal nuisance presents a threat to Congress' constitutional authority to enact laws balancing competing interests. In this context, a federal common law of nuisance is not only unnecessary, and a usurpation of legislative power, it is also wasteful from a standpoint of judicial administration.

The issues surrounding the conditions of our nation's environment are complex. The national interest in a productive economy and reliable energy resources requires a delicate balance with environmental concerns. Control of environmental quality requires engineering, biological, chemical, economic, political and management skills. Federal agencies have been created to harness these disciplines to implement a national environmental protection scheme. Judicial review must be invoked to resolve disputes and in that role, the courts should take an active part in determining whether the agency has relied upon substantial evidence in making its decision and properly interpreted the statute. Although we believe the courts are often too deferential to agency decisions, the administrative process is quicker, less expensive and better suited for discussions, negotiation and initial resolution of these complex issues than is formal litigation. The courts must act as a procedural check on the agencies,

but should not supplant them, only thoroughly review them.

Federal courts should not be the forum for the creation of substantive environmental standards outside of the legislative mechanism. Review and enforcement of established standards is the proper role for the judiciary. As long as federal common law nuisance remains, given the ease with which a common law claim can be stated in the federal courts, a federal forum will become attractive to those complaining of pollution. By permitting this remedy, the federal courts will inexorably increase their own burdens, a situation which would further clog an already crowded federal court system.

ARGUMENT

THE COURT SHOULD HOLD THAT THE FEDERAL COMMON LAW OF NUISANCE HAS BEEN DISPLACED.

Congress has enacted complex and detailed statutes for environmental protection, including protection of neighboring states' interests, while recognizing competing societal interests. The function of the lower federal courts in these statutes is to review administrative actions and to enforce the requirements established by the U.S.EPA after they have become final. Notwithstanding these remedies, the lower federal courts have relied upon this Court's decision in *Illinois* v. *City of Milwaukee*, 406 U.S. 91 (1972), to consider whether regulated activities constitute a nuisance under federal common law. To allow the lower federal courts to apply the federal common law of nuisance permits the judiciary to create environmental standards independently of the statutory scheme. This is unwise as a matter of judicial policy and constitutes the unconstitutional usurpation of legislative power by the lower federal courts.

A. The Federal Common Law of Nuisance, A Judicially-Created Remedy, Is Displaced When Congress Enacts a Statute Applicable To The Case Or Controversy.

The doctrine of separation of powers prohibits the judiciary from usurping the essential authority of Congress.

The doctrine of separation of powers ascribes to each governmental department an exclusive function. To the judiciary belongs the interpretation and enforcement of the law; to the Congress, the embodiment of public pol-

icy in statutory schemes; and to the Executive, the administration of those schemes. This Court described the allocation of power, with reference to its earliest interpretation:

> While "[i]t is emphatically the province and duty of the judicial department to say what the law is," *Marbury* v. *Madison,* 5 U.S. 137, 177 (1803), it is equally—and emphatically—the exclusive province of the Congress not only to formulate legislative policies, mandate programs and projects, but also to establish their relative priority for the Nation. Once Congress, exercising its delegated powers, has decided the order of priorities in a given area, it is for the Executive to administer the laws and for the courts to enforce them when enforcement is sought.

TVA v. *Hill,* ..... U.S. ....., 98 S. Ct. 2279 2301 (1978). The doctrine preserves intergovernmental boundaries and enchances the exclusive authority of each department. To accomplish these ends the doctrine commands that each branch respect the distinctive provinces of the others.

Application of that approach requires Congress to defer to the judicial functions of interpretation and review, just as the courts must defer to the Congressional function of expressing public policy through statutory enactments. This Court has consistently refrained from substituting its judgment for that of Congressional drafters. In *Califano* v. *Goldfarb,* 430 U.S. 199 (1977), where eligibility classifications within the Social Security Act were challenged, the Court reasoned:

> Congressional decisions in this regard are entitled to deference as those of the institution charged under our scheme of government with the primary responsibility for making such judgments in light of competing policies and interests.

Id. at 210. With this rationale the Court has acknowledged that, in matters of public policy, the judiciary cannot encroach upon legislative authority.

Respect for Congressional decisions formed the basis for the Court's treatment of the statute attacked in *TVA* v. *Hill,* ..... U.S. ....., 98 S. Ct. 2279 ((1978). That controversy pitted the snail darter against the TVA's Tellico Dam project. The Court declined to impose its own judgment when Congress had plainly stated its priorities through the Endangered Species Act. In concluding that the doctrine of separation of powers required restraint where Congress had spoken, the Court stated:

> Once the meaning of an enactment is discerned and its constitutionality determined, the judicial process comes to an end . . . . [I]n our constitutional system the commitment to the separation of powers is too fundamental for us to pre-empt congressional action by judicially decreeing what accords with "commonsense and the public weal." Our Constitution vests such responsibilities in the political Branches.

Id. at 2302-03. In this decision, the Court acknowledged that the priority stated in the Endangered Species Act was an expression of public policy within the exclusive control of the Congress. To maintain the basic structural integrity of the Constitutional design, the Court ruled, the judiciary may not impinge upon the policy-making activities of the legislative branch. *Id.*

A parallel judicial remedy cannot be invoked where Congress has enacted an applicable statute. This Court relied upon that principle when it resolved two controversies of peculiarly longstanding duration. *Mobil Oil Corp* v. *Higginbotham,* ..... U.S. ....., 98 S.Ct. 2010 (1978); *Arizona* v. *California,* 373 U.S. 546 (1963). The course this

Court followed to arrive at these decisions exemplifies its responsiveness to the voice of Congress. In each decision, the Court abandoned a traditional judicial remedy to enforce a federal statute.

The historic struggle of the southwestern states to allocate the waters of the Colorado River was presented to this Court in *Arizona* v. *California, id.* The states had initially attempted to distribute water rights through an agreement, the Colorado River Compact, negotiated in 1922. *Id.* at 557. The Compact failed to quiet the dispute. The states were unwilling to implement the Compact because of continued applicability of two judicial doctrines governing interstate water rights: prior appropriation and equitable apportionment. *See Wyoming* v. *Colorado,* 259 U.S. 419 (1922). The law of prior appropriation—"first in time, first in right"—would have given California the "lion's share" of the water. *Arizona* v. *California,* 373 U.S. at 558. The equitable apportionment rule was the Court's method of measuring the equities of interstate water allocation, and would have required some states to relinquish water to compensate shortfalls in other states. *Id.* at 562. Congress finally enacted the Boulder Canyon Project Act in 1928 to provide a method of apportioning water among the states. 43 U.S.C. §§617-617u. But the controversy did not end there. In 1952, Arizona filed a complaint in this Court against California for infringement upon its rights to water from the Colorado River. *See Arizona* v. *California,* 344 U.S. 919 (1953). The case was resolved ten years later when the Court had weighed the implications of the Boulder Canyon Propect Act. The Court found that Congress had created a comprehensive water apportionment plan. *Arizona* v. *California,* 373 U.S. 546, 565 (1963).

Observing the extensive control over water allocation exerted by the federal statute, this Court did not apply the judicial apportionment doctrines. In holding that the Project Act had displaced the common law remedies, the Court stated:

> Where Congress has so exercised its constitutional power over waters courts have no power to substitute their own notions of "equitable apportionment" for the apportionment chosen by Congress.

Id.

The resolution of an interstate dispute that had persisted for nearly fifty years was accomplished when this Court deferred to a comprehensive Congressional scheme.

This Court again recognized, albeit somewhat belatedly, the principle of judicial deference when presented with the question of a wrongful death remedy for a high seas fatality in *Mobil Oil Corp.* v. *Higginbotham,* ..... U.S. ....., 98 S.Ct. 2010 (1978). The Court's decision culminated a search for a maritime wrongful death remedy that had begun some ninety years before. In 1886, the Court had ruled that the general maritime law did not provide a survivor's remedy when the victim had died on the high seas. *The Harrisburg,* 119 U.S. 199 (1886). Since the states had enacted wrongful death statutes, that remedy was available when the fatality occurred in state waters, but not beyond the territorial limits. To correct the anomalous effect of a remedy based on how far from the shore the victim had died, Congress passed the Death on the High Seas Act in 1920. 46 U.S.C. §761 *et seq.* The statute granted a wrongful death remedy in admiralty for deaths beyond the three-mile coastal limit. The act is patterned after the state wrongful death statutes, governing the class of beneficiaries, the statute of

limitations, continuation of the action, and contributing negligence. *Id.*

The Supreme Court did not repudiate *The Harrisburg* until 1970, in *Moragne* v. *States Marine Lines, Inc.*, 398 U.S. 375 (1970). There the victim had died while working on a vessel in Florida waters. The Florida wrongful death statute did not recognize a claim based upon unseaworthiness. Because the fatality had occurred in state waters, the Death on the High Seas Act was also precluded. In response, the Court specifically overruled *The Harrisburg* and held that the general maritime law provides a wrongful death remedy, thus permitting the widow to seek damages despite Florida law. *Moragne* v. *States Marine Lines, Inc.*, 398 U.S. at 409. That ruling was subsequently broadened in *Sea-Land Services, Inc.* v. *Gaudet*, 414 U.S. 573 (1974).

In *Gaudet*, the fatality had occurred aboard a vessel in Louisiana waters. The survivor brought a claim under the general maritime law, seeking compensation for loss of society which was not permitted by the Louisiana wrongful death statute. The Court held that since admiralty had traditionally demonstrated a concern for the survivors of seamen, compensation was available for loss of support, services, and society, without regard to place of death. *Id.* at 590.

The *Moragne* and *Gaudet* decisions, when read together, appeared to replace the Death on the High Seas Act. Where the statute had been enacted to eliminate an inequity between state statutes and the admiralty law, new anomalies had been created when the Court broadened the maritime remedies. The *Gaudet* rule could be used to bypass entirely both the Death on the High Seas Act and state wrongful death statutes.

The confusion created by two parallel remedies, one created by Congress in 1920 and one created by *Gaudet* in 1974 was resolved in *Mobil Oil Corp.* v. *Higginbotham*, ... U.S. ....., 98 S.Ct. 2010 (1978). Again survivors of fatalities in Louisiana waters sought recovery for loss of society based upon general maritime law. The precise issue presented to the Court was whether the *Gaudet* decision or the Death on the High Seas Act provided the measure of damages. This Court deferred to the Death on the High Seas Act, holding that it constituted the Congressional expression of a wrongful death policy. The Court explained:

> [A] desire for uniformity cannot override the statute . . . . The Act does not address every issue of wrongful death law, . . . but when it does speak directly to a question, the courts are not free to "supplement" Congress' answer so thoroughly that the Act becomes meaningless . . . . There is a basic difference between filling a gap left by Congress' silence and rewriting rules that Congress has affirmatively and specifically enacted . . . . [*W*]*e have no authority to substitute our views for those expressed by Congress in a duly enacted statute.*

Id. at 2015 (emphasis supplied).

This Court again invoked judicial restraint, reasoning that the goal of uniformity did not justify the nullification of an Act of Congress. As in *Arizona* v. *California*, 373 U.S. 546 (1963), the Court had resolved a decades-long controversy by recognizing that the Court had no authority to displace or modify a Congressional remedy.

Thus, where Congress has addressed an issue, that decision must be respected by the courts, unless the act

is unconstitutional. A judicial remedy may not be invoked to override the Congressional decision. When the Court has adhered to the separation of powers and yielded to the commands of Congress, long-standing interstate controversies have been finally resolved.

B. Congress Has Addressed The Subject Matter Of The "Federal Common Law Of Nuisance" By Enacting Complete And Detailed Statutes Which Prescribe The Appropriate Degree Of Federal Protection Of The Environment.

Since April 24, 1972, the date of this Court's decision in *Illinois* v. *City of Milwaukee,* 406 U.S. 91 (1972), Congress has enacted, or substantially strengthened, legislation concerning every known environmental medium. While this Court stated "When we deal with *air* or *water* in their ambient or interstate aspects, there is a federal common law . . . ." *id,* at 103 (emphasis added), Congress has gone further.

The modern version of the Federal Water Pollution Control Act, as amended by the Clean Water Act of 1977, was enacted on October 18, 1972 and governs federal control of wetlands and "waters of the United States." 33 U.S.C. §1344, 1362(7). The Clean Air Act of 1970 has been implemented and significantly amended by P.L. 95-95 in 1977. The Resource Conservation and Recovery Act of 1976 ("RCRA," P.L. 94-580) completely revamped the Solid Waste Disposal Act, and created a cradle-to-grave scheme to protect against land, water and air "pollution" from liquid and solid "wastes". 42 U.S.C. §6901(b). The new Toxic Substances Control Act ("TSCA," P.L. 94-469), together with the 1972 revisions to

the Federal Insecticide, Fungicide and Rodenticide Act ("FIFRA," P.L. 92-516), regulate the acceptable methods for use of chemicals, including agricultural applications. The Safe Drinking Water Act of 1974 (P.L. 93-523) adds yet another protective measure for public water supplies. And various provisions of other federal statutes control even the siting of new facilities. As a result of these legislative activities, the text of the procedural and substantive regulations promulgated solely by the United States Environmental Protection Agency will soon become more lengthy than those adopted by the Internal Revenue Service.

These statutes, as explained in some detail below, have addressed not only the substance of the federal common law of nuisance, but also the procedural justification for this Court recognizing a federal common law of nuisance claim in *Illinois* v. *Milwaukee*. They contain several features which are relevant to the question presented. Each provides substantial environmental protection in the context of an urbanized and industrial society. The Clean Air, Clean Water and Resource Conservation and Recovery Acts impose mandatory duties upon the Administrator of U.S.EPA to adopt regulations pursuant to economic, scientific and other specified criteria and provides that private citizens may sue in federal court to compel the performance of those dutes. Citizens enjoy broad rights to participate in rulemaking permitting and enforcement actions. The statutes generally provide, however, that when rulemaking and permitting actions are completed, such administrative action must be challenged at that time, and cannot be challenged later. The introduction of new chemicals, significant new uses of chemicals and significant new construction are prohibited by

other statutory provisions until specific standards have been met and administrative approval received. These standards and approvals too are judicially reviewable by an adversely affected person. Thus, Congress has enacted statutes which require regulations defining the appropriate degree of protection, allow for participation by any person affected by administrative action, provide for judicial review of that action and focus judicial enforcement upon final standards. The general Congressional approach to environmental protection has been to involve the executive and the judiciary to carry out its laws, while permitting the states, environmentalists and industry alike to be involved at nearly every stage of the proceedings.

1. Protection of Surface Waters — The Clean Water Act.

Less than six months after the Court's decision in *Illinois* v. *Milwaukee,* Congress enacted, over the President's veto, the modern version of the Federal Water Pollution Control Act, now known as the Clean Water Act. That statute states the definitive federal rule of decision, and should now be expressly so recognized by this Court as displacing the federal common law of nuisance.

The Concept of Discharge Control and Technology-Based Limits

Prior to the 1972 Amendments, the Federal Water Pollution Control Act had provided for actions to restrict those discharges which caused water quality problems. Congress rejected this nuisance-like theory, and opted for control at the point of discharge. *EPA* v. *California,* 426 U.S. 200, 204 (1976). Section 301(b) of

the Act now prescribes the timetable for attainment of specified levels of treatment technology by dischargers. It also establishes the criteria which must be applied to define the appropriate discharge level. 33 U.S.C. §§1311 (b)(1)(A) and (b)(2)(B), 1317(a)(2). The necessary degree of treatment must be based on "the age of equipment and facilities involved, the process employed [and] the engineering aspects of the various types of control techniques, process changes, non-water quality environmental impact (including energy requirements). . . . ." 33 U.S.C. §1314(b)(1)(B), -(2)(B). "Best practicable treatment" must also reflect a "consideration of the total cost of application of technology in relation to the effluent reduction benefits to be achieved. . . . ," 33 U.S.C. §1314(b)(1)(B) while "best available treatment" must include a consideration of "the cost of achieving such effluent reduction. . . ." *Id.* §1314(b)(2)(B). Publicly-owned treatment works are expected to attain effluent levels similar to best practicable treatment (secondary treatment) and ultimately to employ "best practicable waste treatment technology over the life of the works. . . ." 1281(g)(2)(A). *See id.* §§1311(b)(1)(B), 1311(b)(2)(B). Business which use publicly-owned treatment works are subject to general and categorial pretreatment standards. *Id.* §1317(b)(1).

Permitting Procedure

A second significant feature of the 1972 Amendments was the creation of the National Pollutant Discharge Elimination System ("NPDES") permitting program.

See, EPA v. *California,* 426 U.S. 200, 204 (1976). This program establishes a procedure by which Illinois, or any other state, could contest the permits issued to a source located in another state.

Sections 402(a) and (b) provide that NPDES permits, whether issued by U.S. EPA or a state, are to include conditions which apply and insure compliance with any applicable requirements of sections 301, 302, 306, 307 and 403 of the Act. 33 U.S.C. §1342(a)(1), -(b)(1)(A). The necessary conditions thus include any effluent limitation "necessary to meet water quality standards. . . established pursuant to any State law or regulation. . . ." *Id.* §1311(b)(1)(C). A state with NPDES authority must provide any other state whose waters "may be affected" by a discharge, notice of each application and "an opportunity for public hearing before a ruling on each such application." *Id.* §1342(b)(3). The issuing state must also:

> ". . . insure that any State (other than the permitting State), whose waters may be affected by the issuance of a permit may submit written recommendations to the permitting State (and the Administrator) with respect to any permit application and, if any part of such written recommendations are not accepted by the permitting State, that the permitting State will notify such affected State (and the Administrator) in writing of its failure to so accept such recommendations together with its reason for so doing."

Id. §1342(b)(5); *accord,* Wisc. Stat. §147.11-.13(1),-.20. Congress intended that U.S. EPA would exercise its power to object to the state-proposed permit when another state objects. See 40 C.F.R. §123.24 (1979); 123 Cong. Rec. H 12934 (December 15, 1977). An objection by U.S. EPA would preclude the state from issuing a

valid permit. 33 U.S.C. §1342(d)(2)(A). Congress has now amended the act to authorize U.S. EPA to hold a hearing and itself issue the permit in a dispute between the states. *Id.* §1342(d)(4). Thus, Congress expressly provided a remedy which the Illinois Attorney General could have used and which addressed the very issue originally presented in this court's decision in *Illinois* v. *Milwaukee.* Moreover, section 505(h) allows a Governor of a state to immediately sue the Administrator where U.S. EPA is not enforcing an effluent limitation, which under section 505 includes the requirements of section 301(b)(1)(C) against a discharger located in another state. 33 U.S.C. §§1365(h), -(f)(2).

In addition to the rights granted to adjoining states, the permitting process allows the affected discharger (whether it be an industry or a municipality), the public and other state and federal agencies to participate in the translation of general standards and limitations into specific requirements for the discharger. Unique circumstances may be taken into account under any one of several theories: the plant is fundamentally different than the facilities used as a base for promulgation of regulations (*e.g., Alton Box Board Company* v. *U.S. EPA,* 592 F.2d 395 (7th Cir. 1979); the discharger cannot afford to install additional technology, but is making progress toward eliminating its discharges, 33 U.S.C. §1311(c); the discharger proposes to install innovative technology that has potential long-term benefits over conventional treatment methods, *id.* §1311(k); or the discharge of non-conventional, non-toxic pollutants will not prevent attainment of certain water quality objectives, *id.* §1311(g). In addition, qualifying publicly-owned treatment works and industries who proposed to connect to

such works when completed, may be given until July 1, 1983 to meet the 1977 objectives of section 301(b)(1). 33 U.S.C. §1311(i). Furthermore, municipal treatment plants which discharge to marine waters may receive exemptions or modifications of the general effluent requirements for such discharges if they can meet the water-quality-related, and other criteria specified in section 301(h). 33 U.S.C. §1311(h). And the applicable pretreatment requirements for businesses who discharge to municipal treatment works which provide treatment of a particular regulated pollutant, are to be revised accordingly, so long as the acceptable uses (including disposal) of the municipal sludge are not impaired. *Id.*, §1317(b)(1). The plain intent of this requirement is to eliminate the duplicative costs of "treatment for treatment's sake." 123 Cong. Rec. H 12933 (December 15, 1977). U.S. EPA has promulgated a detailed regulation to implement these pretreatment requirements and revisions, and published its "National Pretreatment Strategy." 40 C.F.R. Part 403 and App. A.

Certainty and Finality of Administrative Action

Another feature of the Act is the certainty and finality accorded administrative action. Section 509(b)(1) provides for review by the circuit court of appeals of regulations issued under sections 301, 302, 306 and 307, the approval of state permit programs under section 402(b) and the denial or issuance of permits by U.S. EPA. *See, Crown Simpson Paper Company* v. *Costle*, 48 U.S. L.W. 3596 (March 18, 1980) (per curiam); *DuPont* v. *Train*, 430 U.S. 112 (1977); 33 U.S.C. §1369(b)(1). Because of the broad right to participate before U.S. EPA, state governments, industry and environmentalists alike

are within the provisions of section 509(b)(1). *E.g., EPA* v. *California,* 426 U.S. 200 (1976); *DuPont* v. *Train,* 430 U.S. 112 (1977); *Natural Resources Defense Council* v. *EPA,* 537 F.2d 642 (2d Cir. 1976). But section 509(b)(2) provides that:

> Action of the Administrator with respect to which review could have been obtained under paragraph (1) of this subsection shall not be subject to judicial review in any civil or criminal proceeding for enforcement.

33 U.S.C. §1369(b)(2). Indeed, the specific requirements for individual permittees pursuant to section 402 and the finality required by section 509(b)(2) were intended to facilitate enforcement of the Act. *See, EPA* v. *California,* 426 U.S. at 205.

In addition, section 402(k) provides that compliance with the terms of an NPDES permit "shall be deemed compliance" for purposes of enforcement actions brought by the Administrator under section 309 and citizens under section 505, with the principal discharge-control sections of the Act. 33 U.S.C. §1342(k). The only exception to this protection is for "any standard imposed under section 307 for a toxic pollutant injurious to human health." *Id.* This section then "insulate[s] permit holders from changes in various regulations during the period of a permit and . . . relieve[s] them of having to litigate in an enforcement action the question whether their permits are sufficiently strict." *DuPont* v. *Train,* 430 U.S. at 138, n. 28. This certainty is destroyed by the federal common law of nuisance as an independent, judicial override of an NPDES permit.

Enforcement by "Citizens"

The legislative decisions made by Congress in the Act are integrally related with the authorization of citizen suits in section 505. By requiring the Administrator to adopt regulations, by providing for the application of the general statutory and regulatory requirements into plant-specific NPDES permits and by stating that final NPDES permits could not later be relitigated, Congress created certainty for the water pollution control effort. Citizen suits against dischargers and the Administrator were allowed by section 505(a). But Congress was emphatic that citizen claims were not to go beyond the requirements established via the administrative processes. And it is clear that both a state and the Illinois Attorney General are "citizens" under section 505. 33 U.S.C. §1365 (g); *Illinois* v. *Outboard Marine Corporation,* Nos. 79-1341, 79-1725 (7th Cir. March 29, 1980).

The legislative history of section 505 begins in the Senate in November, 1971. For purposes of its application to the instant case, the commitee bill is identical to that enacted. The committee report, S.Rep. No. 92-414, 92d Cong., 1st Sess. (1971), states its intent concerning judicial acceptance of "citizen suits."

> Section 505 would not substitute a "common law" or court-developed definition of water quality. An alleged violation of an effluent control limitation or standard would not require reanalysis of technological in [sic] other considerations at the enforcement stage. These matters will have been settled in the administrative procedure leading to the establishment of such effluent control provision. Therefore, an objective evidentiary standard will have to be met by any citizen who brings an action under this section.

Id. at 79, 2 Legis. Hist. at 1497.[1] Congress thus intended that citizens use the federal administrative process to establish necessary effluent limitations before suing in federal court. *See also,* 33 U.S.C. §1365(b)(1)(A) (requiring sixty days advance notice to the Administrator before suit could be filed to compel performance of his duties under the Act).

Furthermore, it is clear that Congress intended section 505 to provide an additional base of federal jurisdiction, but that section 505 was not intended to allow citizens to bypass the detailed and complex administrative scheme created by the Act. Section 505(e) states:

> Nothing *in this section* shall restrict any right which any person (or class of persons) may have under any statute or common law to seek enforcement of any effluent standard or limitation or to seek any other relief (including relief against the Administrator or a State agency).

33 U.S.C. §1365(e) (emphasis supplied). This provision is identical to the 1971 Senate bill. S. 2770, 92d Cong., 1st Sess. §505(e) (1971); 2 Legis. Hist. at 1706; *see also,* Clean Air Act of 1970, §304(e), 42 U.S.C. §7604(e).

The plain meaning of the emphasized language is that section 505 was not intended as the *exclusive* jurisdictional basis for private actions concerning water pollution. But the language clearly implies that the substantive statutory criteria of the Act, including the limitations, standards and other requirements to be prescribed by the Adminis-

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[1] All citations to "Legis. Hist." refer to "A History of the Federal Pollution Control Act Amendments of 1972 (Committee Print, 1973).

trator and the states under the Act, *were to be the federal rule of decision.*

Moreover, the legislative history of section 505(e) makes clear that this subsection was not intended as Congressional acceptance of a substantive federal judicial remedy and common law definition of acceptable water quality. The Senate included section 505(e) in order to preserve claims for damages based on the established law of damages. The 1971 Senate report indicates that traditional class action issues — the identity of the parties, the allegations of a minimal jurisdictional amount and the allocation of the damage award — were deemed inappropriate considerations when citizens are seeking to enforce water pollution controls. S. Rep. No. 92-414, 92nd Cong., 1st Sess. 81 (1971); 2 Legis. Hist. at 1499. The report states:

> Thus, if damages could be shown, other remedies would remain available. Compliance with requirements under this Act would not be a defense to a common law action for pollution damages.

Id. The House report too, published in March, 1972, paraphrases this portion of the Senate Report and states that *section 505* was not intended to pre-empt "other relief under any statute or common law. . . ." H. Rep. No. 92-911, 92d Cong. 2d Sess. 134 (1972); 1 Legis. Hist. at 821. It was not until a month later that the "federal common law of nuisance" for any dispute was adopted by this Court in *Illinois* v. *Milwaukee*. And, we submit, the *ratio decidendi* of that decision was the presence of conflicting state interests and the need for an impartial federal rule of decision, a forum provided by the 1972 Amendments and the present Clean Water Act. Furthermore, in light of a comparable provision in the 1970

Clean Air Act, section 505(e) was clearly not intended to preserve the federal common law of nuisance.

Non-Point Source and Supplemental Controls

In addition to the extensive program to reduce discharges from point sources, the Act contains several programs to control non-point source pollution and remedy eutrophication problems. Section 314 requires the state to prepare and submit an inventory of fresh water lakes according to their eutrophic condition to U.S. EPA and directs U.S. EPA to provide funding sources for methods (including land use planning) to restore the quality of such lakes. 33 U.S.C. §1324(a). Section 108(d) commanded an ambitious, and apparently successful, restoration of Lake Erie and directs the Administrator to fund projects to demonstrate practical methods of removing pollutants from and preventing pollutants from entering the Great Lakes. 33 U.S.C. §1258(a). Basin and regional planning (including multi-state areas) is required to be developed in order to address areas with "substantial water quality control problems." 33 U.S.C. §§1288(a), 1289. And each state must identify priority areas for which the 1977 requirements for technology-based effluent limitations are inadequate "to implement any water quality standard applicable to such waters . . . .", identify the acceptable loadings from NPDES permit holders into that body of water, and to provide for a continuous planning process to meet these needs. *Id.* §1313(d)(1)(A),-(d)(1)(C),-(e)(3).

Municipal Funding

The 1972 Amendments originally passed by Congress were vetoed by President Nixon as too costly, principally because of the sums authorized for construction

of municipal treatment works. 1 Legis. Hist. at 137-139. After the Congress overrode the veto, the President impounded nearly half of these funds, an action which was later held unlawful in *Train* v. *City of New York,* 420 U.S. 35 (1975).

Congress has only authorized the payment to municipalities of a 75 per cent share of the costs recognized as appropriate by the Act. 33 U.S.C. §1282(a). The size and capacity of the proposed treatment facility must "relate directly to the needs to be served by such works, including sufficient reserve capacity. . . ." for future growth. *Id.* §1284(a)(5). Thus primary and secondary treatment of all stormwater flows is not recognized by U.S.EPA as cost-effective and hence eligible for federal funding. EPA, Office of Water Programs Operation, "Program Guidance Memorandum 61," PRM 75-34 (December 16, 1975). Moreover, in response to comments made by the conference committee in the 1979 Appropriations bill, funding of construction for advanced secondary treatment facilities has been restricted by U.S.EPA. EPA, "Grant Funding of Projects Requiring Treatment More Stringent than Secondary", PRM 79-7 (March 9, 1979). Indeed, this policy effects those facilities in Illinois required by the Illinois Pollution Control Board to meet its effluent standards of 10 mg/1 BOD and 12 mg/1 suspended solids. *See Illinois* v. *EPA,* No. 79-3480, (D.D.C., filed ....., 1980).

The effect of a judge-made standard on municipalities and their taxpayers can be onerous. Assume that the funds for a hypothetical municipal treatment works would cost $100 million and that the construction project is eligible for a $75 million federal grant, but that a federal judge determines that additional control, at a cost of $25

million, is appropriate to "abate a nuisance". The capital cost of $25 million must come from local funds, and the municipality must alone pay for additional operating costs. 33 U.S.C. §1284(a)(4). Moreover, the real cost to the municipality, and its taxpayers would double in this hypothetical, even though the federal judge increased the total cost by only 25 per cent.

The presence of the municipal construction program was an important political decision for Congress to make in conjunction with enactment of the 1972 Amendments. Congress has announced the importance of federal aid to assist municipalities in attaining federal environmental requirements. The lower federal courts ought not be authorized, under the banner of nuisance, to create their own standards for discharge control.

2. Protection Of Ambient Air Quality — The Clean Air Act

The other half of the rule announced in *Illinois* v. *Milwaukee* concerns protection of air in its interstate or ambient aspects. Like the Clean Water Act, the Clean Air Act addresses the issue of control of pollution of interstate or ambient air.

Control of Existing Stationary Sources

Section 109 directs the Administrator to adopt "primary" and "secondary" air quality standards for those pollutants for which air quality criteria had been issued. 42 U.S.C. §7409(a). Primary air quality standards are those necessary with an adequate margin of safety to protect public health, while secondary standards are to protect the public welfare from adverse effects associated with the criteria pollutant. *Id.* §7409(b). To attain and

maintain the primary standards, and to achieve ultimately applicable secondary standards, Congress has required the states to submit "implementation plans" to the Administrator for approval. *Id.* §7410(a)(1); P.L. 95-95, §129(c).

After a state implementation plan ("SIP") is submitted, the Administrator proposes his action in the Federal Register. If a public hearing was not held by the submitting state, one must be held by U.S. EPA. 42 U.S.C. §7410(c)(1). Approval of the plan is subject to review in the local circuit court of appeal. *Id.* §7607(b)(1).

The federal question in approving a SIP is quite limited. U.S. EPA may consider only the criteria specified in section 110(a)(2). The most significant question is whether the plan contains adequate enforceable requirements "to insure attainment and maintenance" of the air quality standards within the time period allowed by the Act. *See e.g.,* 42 U.S.C. §§7410(a)(2)(A);-(B);-(I), 7502(a)(1). Each state is free to select whatever mix of environmental controls it finds appropriate. U.S. EPA can only evaluate whether the plan meets the requirements of §110(a)(2). *Natural Resources Defense Council* v. *Train,* 421 U.S. 60 (1974); *Union Electric* v. *EPA,* 427 U.S. (1976).

A necessary ingredient of any state implementation plan is the protection of the interests of adjoining states. Section 110(a)(2)(E) requires that a SIP contain:

> adequate provisions (i) prohibiting any stationary source within the State from emitting any air pollutant in amounts which will (I) prevent attainment or maintenance by any other State of any such national primary or secondary ambient air quality standard, or (II) interfere with measures required to be included in the applicable implementa-

> tion plan for any other State under part C of this subchapter to prevent significant deterioration of air quality or to protect visibility, and (ii) insuring compliance with the requirements of section 126 relating to interstate pollution abtement;

42 U.S.C. §7410(a)(2)(E). Section 126 requires that each adjoining state receive written notice of the existing and new out-of-state sources which "may have" a significant impact on ambient air quality in that state. *Id.* §7426 (a). The adjoining state may petition the Administrator for a determination of whether or not "any major source emits air pollutants in violation of section 110(a)(2)(E) (i)." *Id.* §7426(b).

If the Administrator finds that plan does not include the prescribed safeguards, he must disapprove the plan and proceed to prepare and promulgate the necessary regulations. *Id.* §7510(a)(1). If a state or private citizen believes the plan as approved by the Administrator to be inadequate to achieve the ambient air quality goals, it may be challenged. *Id.* §7607(b)(1); *Natural Resources Defense Council* v. *Train,* 421 U.S. 60 (1974).

Furthermore, section 126(c) states that any source that does violate section 110(a)(2)(E)(i) is in violation of whatever SIP was approved for the state within which the source is located, regardless of whether any permit has been or would be issued by that state.[2] Hence, any state may sue a source located in another state if that source

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[2] As discussed in the following section, a permit is required before major new or modified facilities are constructed. Moreover, many states, including Illinois, require existing sources to obtain a permit to continue operation, and condition receipt of a permit upon compliance with state regulations. Chapter 2, Rule 103(a) of Illinois Pollution Control Board.

unduly affects its ambient air quality under Section 304 of the Act. The Administrator, however, may permit continued operations conditioned upon timely compliance. 42 U.S.C. §7426(c).

Construction of New or Expanded Facilities

Soon after the Clean Air Act of 1970 was adopted, the Sierra Club sued the Administrator for failing to maintain existing air quality, particularly to protect relatively pristine areas from degradation in air quality due to new construction. The Sierra Club argued that such controls were required as part of every SIP. The court agreed and preliminarily enjoined U.S. EPA from approving SIPs without a regulation protecting against degradation to levels above secondary ambient air quality standards. *Sierra Club* v. *Ruckelshaus,* 1344 F.Supp. 253 (D.D.C. 1972). The Court of Appeals affirmed in a memorandum, unpublished order, and this Court by an equally divided court, affirmed without opinion, *Id., aff'd subnom., Fri* v. *Sierra Club,* 412 U.S. 541 (1973). U.S.EPA subsequently promulgated regulations protecting "clean air" areas against "significant deterioration" and included the regulation in all state plans. 39 Fed. Reg. 42510 (1974). The debate continued, and soon included the extent to which new plants should be allowed to be built in areas where the primary and secondary standards had not been attained. On December 21, 1976, U.S. EPA published its "Interpretative Ruling" as to the circumstances under which major new or expanded facilities could be built under the Act. 41 Fed. Reg. 5524 *et. seq.* Despite these administrative actions, the debates continued and were finally resolved by Congress in the 1977 Amendments to the Act. P.L. 95-95 (1977).

This legislation is significant because it directly contradicts the basic premise of the common law of public nuisance that actions which interfere with a public right will be enjoined. Particularly with regard to non-attainment areas, Congress rejected a prohibition on "new" pollution (construction of new plants or expansions of existing facilities.) Instead, Congress enacted a detailed scheme for progress toward attainment of the standards while permitting even major new emitting facilities to be built.

Subpart D now gives states until December 31, 1982 to attain most primary air quality standards, and in some situations, until December 31, 1987 to attain the standard for photochemical oxidants and carbon monoxide. 42 U.S.C. §7502(a). States must adopt requirements to satisfy Part D as part of their amended implementation plans. *Id.* §7510(a)(2)(I); P.L. 95-95 §129(c). Only the construction of new major emitting facilities (facilities whose construction or expansion causes an increase of more than 100 tons per year of any criteria pollutant) is subject to Part D. 42 U.S.C. §§7410(a)(2)(I), 7503(1)(A), 7602(j). Construction of major emitting facilities is to be authorized where equivalent offsets in emission from other sources will be achieved by the time the new facility begins operation, the allowable emissions from the new or expanded source reflects the "lowest achievable emission rate", other major emitting facilities under common ownership in the state are in compliance, reasonable further progress toward ultimate attainment will not be impeded, and the implementation plan is being carried out. *Id.* §7503.

The 1977 Amendments also addressed the significant deterioration issue, and again provided for adjoining

states to be heard concerning construction of new or expanded facilities. The requirements of Part C are also necessary elements of a state implementation plan. However, the Administrator has already promulgated revised regulations in response to the Amendments, and has proposed substitute regulations to conform to the interpretation of the Act given him by the Circuit Court of Appeals for the District of Columbia in *Alabama Power Co.* v. *Costle,* 606 F.2d 1068 (D.C.Cir. 1979).[3] In that case the court held, *inter alia,* that Part C applied to new major emitting facilities built in non-attainment areas, but only if the attainment area affected was in another state. *Id.* at 1084. The court noted the special attention given by Congress to "interstate" air pollution and the extra coverage of Part C for clean-air areas of another State, citing the provisions of section 110(a)(2)(E)(i) and 126 discussed above. *Id.*

Judicial Review: Certainty, Finality and Citizen Enforcement

The provisions for judicial review under the Clean Air Act are comparable to those discussed above in the Clean Water Act. Further, the case law under the 1970 Act, the 1977 Amendments and the basic complexity of state implementation plans, achieve a result quite similar to the legal effect of the NPDES program.

In *Natural Resources Defense Council* v. *Train,* 421 U.S. 60 (1974), this Court held that a state could issue, and U.S.EPA could approve, variances from an approved implementation plan, but only if those changes were approved as revisions to the SIP. The 1977 Amendments

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[3] The State of Texas and District of Columbia were also parties in this case.

specifically incorporated this requirement in §110(i). 42 U.S.C. §7410(i). Because an implementation plan is reviewable under §307(b)(1), it cannot later be collaterally challenged *Id.* §7607(b)(2); *City of Highland Park* v. *Train,* 519 F.2d 681, 697 (7th Cir. 1975). Thus, approval of an implementation plan provides certainty and finality as to the requirements needed to achieve the Congressional goals.

Second, the effect of the Clean Air Act is to prohibit judge-made definitions of common law air quality standards. The keystones of the act are the ambient air quality standards, mandated for "criteria" pollutants, under section 109(a). 42 U.S.C. §7409(a) Review of these standards is also provided for by section 307(b)(1); hence they too cannot be re-litigated in enforcement actions, either for being too strict or not strict enough. *See DuPont* v. *Train,* 430 U.S. at 138, n. 28. Administrative re-evaluation of these standards is required at five year intervals. 42 U.S.C. §7409(d).

Third, citizen enforcement is authorized against any person who allegedly is in violation of an "emission standard or limitation" or an order of the Administrator or a state concerning the standard or limitation. The words "emission standard or limitation" is a defined phrase for purposes of section 304. It includes several specific types of requirements established under the Act or by an implementation plan, but does not include primary or secondary air quality standards. *Id.* §7604 (f).

Further, section 304(e) is a savings clause. But like the Clean Water Act it simply states that "this section" is an exclusive remedy and uses the same words, "any statute or common law" as found in section 505(e) of

the Clean Water Act. Yet section 304(e) was drafted in 1970 and enacted in December, 1970, long before *Illinois* v. *Milwaukee* was even filed. Thus, it would be extremely presumptuous in interpret the language, in either statute, as a Congressional authorization for a substantive judge-made body of environmental law parallel to these statutes.

Motor Vehicle Emissions

An alleged anti-competitive restraint in the development of motor vehicle emissions equipment was the subject matter of *Washington* v. *General Motors Corp.*, 406 U.S. 109 (1972), decided the same day as *Illinois* v. *Milwaukee*. Congress has now made clear that the timetable for the development and installation of such equipment is a legislative judgment. It has repeatedly adjusted the timetable and requirements of Subchapter II, Part A, of the Clean Air Act. 42 U.S.C. §§7521 to 7551. And it has generally prohibited state regulation of new motor vehicles which are subject to the act. Id. §7543(a), (c).

3. The Resource Conservation and Recovery Acts

Enacted in 1976 as a complete amendment to the Solid Waste Disposal Act (42 U.S.C. §3251 *et. seq.*), the Resource Conservation and Recovery Act ("RCRA", 42 U.S.C. §6901 *et. seq.*) extends federal regulation far beyond interstate air and water pollution control. Congress found that the prevailing practice of refuse disposal in landfills, the greater quantities of solid waste caused by air and water pollution treatment, the decreasing availability of disposal sites and the threat of air and water pollution resulting from inadequate disposal of solid and hazardous waste required immediate

action. *Id.* §6901(b). It directed the Administrator to promulgate the most far-reaching set of federal environmental regulations, prescribing standards for persons who either generate, transport, treat, store or dispose of "hazardous waste." The Act authorized the creation of regional and multi-state agencies to formulate regional plans for waste disposal. *Id.* §§6904, 6941, 6942(a), 6946 (a), (c).

Comprehensive Federal Standards

Under section 3001, the Administrator must identify the characteristics for identifying hazardous waste and list particular hazardous wastes. 42 U.S.C. §6921(a), (b). Any waste listed [*see* 45 Fed. Reg. 33119-33 (1980)], and any person who handles such a waste, are subject to stringent standards. The standards fit together as a (cradle-to-grave) regulation of these materials. Generators must keep records, prepare a proper manifest and properly label and prepare hazardous wastes for shipment. 42 U.S.C. §6922. Transporters are essentially expected to insure that the labeling is proper, the manifest in order, and to keep records and deliver the waste only to the permitted treatment, storage or disposal facility identified in the manifest. *Id.* §6923(a). Persons who treat, store or dispose of hazardous wastes are subject to standards requiring proper recordkeeping, reporting and self-monitoring, requiring satisfactory treatment storage and disposal practices, requiring financial responsibility generally and contingency plans for unanticipated events, and obtaining a permit to operate the site. *Id.* §§6924, 6925.

These regulations are truly awesome in their bulk, complexity and stringency. See 45 Fed. Reg., May 19, 1980, Parts II, III, V, VI, VII. For example, to be permitted

and to remain in operation all hazardous waste disposal sites must deposit a sufficient reserve fund to pay for the proper closing and sealing of the site when its use ceases. 45 Fed. Reg. at 33243-44 (1980). And before any active disposal site is closed, a sufficient fund must be deposited to pay for monitoring, patrolling and otherwise securing the site for thirty years. *Id;* 40 C.F.R. §§265.117(d), 265.144(a).

State Authority and Programs

Because this comprehensive regulatory structure is intended to protect against land, air and water pollution including contamination of any groundwater, the federal program should provide sufficient protection against any interstate disputes. While states may prepare their own plans for the enforcement of the federal standards, these programs must be equivalent to the federal program, and provide adequate enforcement of compliance with the federal requirements, and must not be inconsistent with programs applicable in other states. *Id.* §6926(b), (e). The states are prohibited from imposing "any requirements less stringent than the applicable federal requirements." *Id.* §6929. The states may, in addition, submit plans for the closure of open dumps and the application of proper criteria for sanitary landfills for disposal of all non-hazardous wastes. *Id.* §§6943, 6944, 6945. These plans must meet federal guidelines that "insure the reasonable protection of the ground and surface waters from leachate contamination, the reasonable protection of the quality of the surface waters from surface runoff contamination, and the reasonable protection of ambient air quality." *Id.*

§6942(b)(1).[4] Final agency action approving these programs is reviewable.

Judicial Review and Citizen Participation

Like the Clean Air and Water Acts, RCRA permits citizens to sue the Administrator where he has failed to perform a nondiscretionary duty. 42 U.S.C. §6972(a)(2). RCRA creates more mandatory duties than either the air or water acts: the Administrator has a duty to promulgate the several sets of regulations to implement the hazardous waste programs under subtitle C, and duties under subtitle D to establish various guidelines for supplemental state plans to control non-hazardous wastes and to upgrade open dumps. Several private groups, including the Illinois Attorney General, have used this provision to hasten final administrative action.

The final regulations are made judicially reviewable in the Circuit Court of Appeals for the District of Columbia. But these rules cannot later be challenged in an enforcement proceeding. *Id.* §6976(1). Additionally, "any person may petition the Administrator for the promulgation, amendment or repeal of any regulations under this Act," and special provision is made for a Governor to request the Administrator to identify or list a material as a hazardous waste. *Id.* §§6974(a), 6921(c). Public participation in all phases of the program "shall be provided for, encouraged and assisted by the Administrator and the States." *Id.* §6974(b).

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[4] In addition to the protection provided by RCRA and the Clean Water Act, the Safe Dinking Water Act, 42 U.S.C. §300 *et seq.*, provides protection for potable water, as contrasted with the conditions of ambient water which composes the raw intake source.

Thus, RCRA provides for comprehensive and final federal standards to guide states and interstate agencies in protecting groundwater, surface water and the ambient air against unreasonable contamination. It encourages public participation and guarantees that the federal courts will review administrative action to assure its conformance to the legislative commands. RCRA is another comprehensive scheme for the control of waste materials.

4. Regulation of Chemicals to Avoid Unreasonable Risks to Health and the Environment (FIFRA and TSCA)

Both the Federal Insecticide, Fungicide and Rodenticide Act ("FIFRA", 7 U.S.C. §135 *et. seq.*) and the Toxic Substance Control Act ("TSCA", 15 U.S.C. §2601 *et. seq.*) deal with licensing chemical products before use, and restrictions upon their use and disposal. The purpose of both statutes is to avoid unreasonable risks of injury to the environment. In contrast to the preceding statutes which focus on controls of waste products, these acts represent an environmental planning approach.

The present version of FIFRA was enacted October 21, 1972, three days after final passage of the Federal Water Pollution Control Act of 1972. Administration of FIFRA was transferred from the Department of Agriculture to U.S.EPA. The pre-existing regulations, however, continued in affect for four years. Sales of unregistered "economic poison" were declared unlawful, 7 U.S.C. §135 (a), as were sales of any poison not stored in its original container. Judicial review is provided for anyone adversely affected by these regulations. 7 U.S.C. §135b(d).

Registration of all pesticides is required. 7 U.S.C. §135a(a). Extensive disclosure statements regarding the

composition of the substances must comply with specific data requirements. 7 U.S.C. §136a(c)(2). A pesticide becomes registered when it has met the criteria announced in the statute. 7 U.S.C. §136a(c)(5), (6). Provision is made for a system of pesticide classification and definition. 7 U.S.C. §136a(d). The statute places specific controls upon anyone who uses pesticides in a restricted manner. 7 U.S.C. §136b(a). Procedures for administrative review, 7 U.S.C. §136d(a), and judicial review, 7 U.S.C. §136n, assure that citizen and industry viewpoints will be considered in the registration process, and that special or unique circumstances can be addressed.

The Toxic Substances Control Act governs the manufacture, distribution, and use of essentially all chemical substances not already regulated by other federal agencies. 15 U.S.C. §2602(2). The statute requires a premanufacture notice to U.S.EPA and testing by the manufacturer or processor to demonstrate that the proposed use of the chemical will not pose an unreasonable risk of injury to human health or the environment. *Id.* §2604(a), (b). A notice of the receipt of a pre-manufacture application must be placed in the Federal Register. 15 U.S.C. §2604(a), (b). The U.S.EPA is authorized to regulate the manner in which new and existing chemical substances are used. 15 U.S.C. §2605(a). The statute grants citizen rights to enforce both the pre-manufacture notices and the use regulations, and to compel U.S.EPA to take mandatory actions. 15 U.S.C. §2619. In addition, a citizen can petition U.S.EPA to perform its duties or adopt a rule, and can appeal the denial of a petition. 15 U.S.C. §2620(a), (b)(4)(A).

5. Federal Restraints on Major New Developments

Another form of "nuisance-prevention" is found is several federal statutes and their implementing regulations which restrain development of certain environmental areas. We mention here only a few.

As noted above, the Clean Water Act contains requirements for regional planning for growth and the ability of stream segments to handle effluent loadings. 33 U.S.C. §§1288(b), 1313(d). Any dredging or filling activities in protected wetland areas must be permitted before they are begun. *Id.* §1344. The Clean Air Act Amendments of 1977 contain significant new requirements for the conditions under which any major new or expanded industrial facility may be constructed. Varying degrees of development are permitted in clean air areas based upon the allowable increment, which defines the allowable degree of air quality deterioration. These increments in turn depend upon the land use of the affected area. 42 U.S.C. §§7472, 7473(b), 7474, 7476(d) (2) (C) (iv), 7475(d) (2) (D) (iii), 7491(a) (1).

Other statutes contain additional landuse controls or incentives for state control pursuant to Congressional criteria. Complementing the new direct controls on coastal wetland development are the ancient requirements of sections 10 and 13 of the 1899 Rivers and Harbors Act. 33 U.S.C. §§403, 407, 1344. Congress has also given the coastal states a fiscal incentive to develop coastal zone plans by its enactment of the Coastal Zone Management Act of 1972. 16 U.S.C. §1451 *et. seq.* Under the Act, implementation depends upon coastal states submitting land use programs for their coastal zones. The administrative criteria for approval of these state plans provide that

local and regional uses which depend upon a coastal location are to be preferred to non-coastally dependent uses. *See generally,* 15 C.F.R. §923.12(c)(4), (c)(5), (d)(3), (d)(4), (d)(5), 923.22(a), 923.52(f) (Table 1) (1979). Interestingly, Wisconsin has adopted the necessary state legislation to implement such land use controls, while the Illinois General Assembly refused to enact the requisite state planning authority. *E.g.,* 44 Fed. Reg. 52712.

Surely a decision by the entity to whom Congress has chosen to delegate the discretion to implement a statute should be respected. It would be a gross usurpation of power, for example in the coastal zone situation, for a federal court to fashion a nuisance theory based upon the "federal interest" expressed in the Coastal Zone Management Act. Such an approach effectively disregards Congress' decision to authorize, but not to mandate implementation. Indeed, discretionary implementation frequently is a key element in passage of any other statute, and may be especially true of the Coastal Zone Management Act.

Thus, the courts should strictly observe the terms of the statute, and not read into the act a "good" result or create their own substantive body of law, except in the most compelling of circumstances. *See, Ernst & Ernst* v. *Hochfelder,* 425 U.S. 185, 197 (1976); *cf. Wheedlin* v. *Wheeler,* 373 U.S. 647, 651 (1963) (the instances where federal common law will be recognized are few and restricted.)

Finally, this Court must consider the judicial role as exemplified by the National Environmental Policy Act ("NEPA", 42 U.S.C. §4331 *et. seq.*). The command of NEPA embodies a general policy of protection of natural

resources. Because of the numerous instances of federal regulation and NEPA's applicability to most actions by federal agencies, NEPA is perhaps the most litigated federal statute concerning conservation of the environment. Numerous federal courts have found a federal interest in the environment based upon NEPA, and from that basis derived a substantive federal remedy. But this Court has consistently held that NEPA provides no substantive judicial remedies. Instead, the judicial function requires that courts subject agency decisions affecting the environment to a close review to determine that the agency did seriously consider the environmental impact of its decision. *See Strycker's Bay Neighborhood Council, Inc.* v. *Karlen,* ..... U.S. ....., 100 S.Ct. 497 (1980); *Vermont Yankee Nuclear Power Corp.* v. *Natural Resources Defense Council,* 435 U.S. 519 (1978); *Kleppe* v. *Sierra Club,* 427 U.S. 390 (1976). Hence, the lack of authority for the lower federal courts to create a substantive requirement based on "nuisance" must also be declared.

C. The Court Should Hold That Congress Has Displaced The Federal Common Law Of Nuisance

The separation of powers doctrine is a basic tenet of federal constitutional law. Two recent decisions by this Court apply this doctrine to facts analagous to the present situation. The rule of *Mobil Oil Corp.* v. *Higginbotham,* ..... U.S. ....., 98 S.Ct. 2010 (1978) and *Arizona* v. *California,* 373 U.S. 546 (1963) is that when Congress has enacted a statute which applies to the subject matter of disputes previously governed by substantive standards of liability created by federal courts, the federal common law remedy is displaced and the case must be decided by the statutory formula. This rule is

but an application of *Erie Railroad* v. *Tompkins,* 304 U.S. 64 (1938), to give the same federal judicial respect to Congress as *Erie* and its progeny have commanded be given to the states. Indeed, to sanction at this time a federal common law of nuisance is to resurrect the discredited "brooding omnipresence" of *Swift* v. *Tyson,* 16 Pet. 1 (1842). *Guaranty Trust Co.* v. *York,* 326 U.S. 99, 102 (1945). Because Congress has enacted applicable legislation to protect the environment, including the provisions of the Clean Water Act which directly apply to the present dispute, there is no constitutional basis for a federal common law of nuisance.

This Court acknowledged that a Congressional statute could displace the federal common law of nuisance in the environmental area in Illinois v. Milwaukee when the Court stated:

> It may happen that new federal laws and new federal regulations may in time pre-empt the field of federal common law of nuisance.

406 U.S. at 107.

On the basis of the earlier Illinois v. Milwaukee opinion, this Court should now recognize that the federal common law of nuisance has been displaced by Congressional actions and policy-making. The environmental statutes outlined above are complex and provide an integrated federal program to protect the environment. Because Congress has chosen to harness the expertise of the Administrator and U.S. EPA, and other federal and state agencies, to formulate initially the specified degree of environmental protection, the need no longer exists for a federal common law of nuisance.

Since 1972, Congress has assembled a wide-ranging administrative scheme for environmental regulation. Sub-

stantively, these administrative standards include controls upon point and non-point sources of pollutants to waters of the United States, new and existing stationary sources of pollutants to the ambient atmosphere, emissions from new motor vehicles, acceptance of chemicals and uses of chemicals, appropriate methods for the control of waste products from industries and municipalities, and the acceptable locations for construction of new and larger manufacturing facilities. Procedurally, the statutes include specific mechanisms for the resolution of complaints by one state against pollution or discharges from a facility located in another state, for participation by any affected person in the administrative process by which environmental standards are adopted, for direct administrative and citizen enforcement of established standards, for the finality of the principal administrative standards, and for the efficient use of judicial resources, either by immediate judicial review of these administrative standards, or specific judicial enforcement of final standards. The statutory and administrative processes thus provide certainty and facilitate the orderly and efficient planning by municipalities and industry for the installation of appropriate pollution control equipment and activities.

To allow a federal common law of nuisance to remain is to permit a judicial override of Congressional and administrative procedures. In light of the extensive rights for citizen and state participation and enforcement, there is no need for this judicial override. Further, such an assertion of judicial authority destroys the significance and the incentive for participation in the Congressional program, and sanctions the creation of a ruling body of federal judge-made law.

Further, if this Court applies the federal common law of nuisance in place of this vast Congressional program, all environmental disputes, even wholly intrastate, can become federal claims. *Illinois* v. *Outboard Marine Corp.*, Nos. 79-1341, 79-1725 (7th Cir. March 20, 1980), 14 E.R.C. 1281, and cases cited therein at 1286. Every environmental complaint (even neighbor versus neighbor) would then present a federal question, dramatically expanding the role of the lower federal courts, and drastically increasing their already over-crowded dockets.

CONCLUSION

For the foregoing reasons, the Illinois State Chamber of Commerce respectfully submits that the time has come for this Court to hold that the federal common law of nuisance has been displaced by Congressional action.

Respectfully submitted,

MARTIN, CRAIG, CHESTER, & SONNENSCHEIN
Attorneys for Illinois State Chamber of Commerce

RICHARD J. KISSEL
JEFFREY C. FORT
JOANNA C. NEW
MARTIN, CRAIG, CHESTER & SONNENSCHEIN
115 South LaSalle Street
Suite 2400
Chicago, Illinois 60603
(312) 368-9700
Of Counsel